Supreme Court, U.S.
FILED
JUL 7 1995
CLERK

(4)

No. 94-1734

# In the Supreme Court of the United States

OCTOBER TERM, 1995

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LANSING DAIRY INC., ET AL., PETITIONERS

*v.*

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

The Agricultural Marketing Agreement Act of 1937 (Act) authorizes the Secretary of Agriculture to issue milk marketing orders containing terms that, *inter alia*, fix minimum prices for milk and provide for adjustments to those prices, known as "location adjustments," based on "the locations at which delivery of such milk * * * is made" to milk handlers. 7 U.S.C. 608c(5)(A)(3). A separate provision of the Act, 7 U.S.C. 608c(18), requires the Secretary to analyze the market conditions for milk before he prescribes or modifies any term in a milk marketing order that fixes minimum prices. The Secretary interprets the Act not to require him to conduct the economic analysis described in Section 608c(18) when he prescribes or modifies the terms in a milk marketing order providing for location adjustments. The question presented is:

Whether the court of appeals correctly upheld the Secretary's interpretation of the Act under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 39 F.3d 1339. The opinion of the district court (Pet. App. 41a-60a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 31, 1994. A petition for rehearing was denied on January 23, 1995. Pet. App. 266a-267a. The petition for a writ of certiorari was filed on April 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Agricultural Marketing Agreement Act of 1937 (Act), 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue and amend marketing orders for various agricultural products, including milk. Under the Act, the Secretary has issued 44 milk marketing orders that "encompass virtually all major metropolitan areas in the United States." Pet. App. 6a.

The Act requires the Secretary, before issuing or amending any marketing order, to hold formal, on-the-record rulemaking proceedings. See 7 U.S.C. 608c(3); 5 U.S.C. 553(c), 556-557; Pet. App. 8a. "In addition, before a milk marketing order * * * may become effective, it must be approved by the handlers of not less than 50% of the volume of milk covered by the proposed order or amendment and also must be approved by at least two-thirds of the affected dairy producers in the region. 7 U.S.C. § 608c(8)." Pet. App. 9a.[1]

The Act provides, 7 U.S.C. 608c(5) (1988 & Supp. V 1993), that milk marketing orders shall contain terms

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay * * *. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the

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[1] "Handlers" are entities, such as dairies, that buy milk from "producers" (*i.e.*, dairy farmers). See 7 U.S.C. 608c(1) (1988 & Supp. V 1993); 7 C.F.R. 1040.9, 1040.12.

> handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. * * *

The Act thus contemplates that a milk marketing order will contain terms classifying milk according to its use;[2] fixing the minimum prices that handlers shall pay for each classification;[3] and providing for adjustments to the minimum prices based on three

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[2] The court of appeals explained the classification system as follows (Pet. App. 6a (citations omitted)):

> Some milk is distributed in fluid form. This milk, called Class I, commands the highest price. Class II milk is milk that is made into "soft products" such as yogurt and cottage cheese. It is priced lower than Class I milk. Other [milk] products with a longer shelf life (such as butter, cheese, and powdered milk) are considered to be Class III; the milk used to produce these products commands the lowest price.

See also Pet. App. 64a (decision of Judicial Officer).

[3] Whereas handlers pay a different minimum price for each classification of milk, producers receive a price for their milk that "is uniform in the sense that it does not vary based on the use to which the milk is put." Pet. App. 7a; see also 7 U.S.C. 608c(5)(B)(c) (1988 & Supp. V 1993) (milk marketing order shall contain terms providing for payment of uniform prices to producers subject to adjustments for, *inter alia*, "the locations at which delivery of such milk is made"). The price that producers receive, known as the "blend price," very roughly reflects the average price for all classifications of milk. See Pet. App. 6a. The device that allows handlers to pay prices for milk that differ according to its end use, while allowing producers to receive uniform prices, is a producer settlement fund. See *id.* at 6a-7a.

specific factors, including the location at which the milk is delivered to the handlers.[4]

A separate provision of the Act, 7 U.S.C. 608c(18), requires the Secretary to consider the economic conditions in the geographic area covered by a marketing order before prescribing any term in a marketing order "if such term is to fix minimum prices," and before "modifying the price fixed in any such term."[5]

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[4] The court of appeals described location adjustments as providing "economic incentives to encourage the movement of producer milk from rural production areas to plants in population centers, and to align prices among neighboring markets." Pet. App. 7a. Location adjustments are made only to the price that handlers pay for Class I milk. *Id.* at 6a; 7 C.F.R. 1040.52(a).

[5] 7 U.S.C. 608c(18) provides in full:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply

b. The milk marketing order at issue here is Order 40, which covers southern Michigan. 7 C.F.R. Pt. 1040; see Pet. App. 3a. On May 4, 1988, the Secretary (through the Agricultural Marketing Service (AMS)) published a notice proposing amendments to, *inter alia*, "the location adjustment provisions" of Order 40. 53 Fed. Reg. 15,851 (1988). As required by the Act, the Secretary held public hearings on the proposed amendments, accepted briefs from interested parties, issued a recommended decision, and ruled on exceptions to the recommended decision. The final decision was issued in June 1989, following approval in a producer referendum. See 54 Fed. Reg. 26,769, 26,779 (1989); *id.* at 29,327. The effect of the final amendments was in general to "increas[e] the amount which producers received for milk produced throughout the Southern Michigan milk marketing area." Pet. App. 9a.[6]

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and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

[6] Prior to the amendments, Order 40 divided the Michigan lower peninsula into seven zones, in each of which a different location adjustment applied. The amount of the location adjustments ranged from 0 cents to -17 cents per hundredweight of milk, increasing (in absolute terms) with the distance of the zone from the market consisting of Detroit, Flint, and Bay City. As amended, Order 40 divides the lower

In written exceptions to the recommended decision, Kraft, Inc., argued that the Secretary had failed to comply with Section 608c(18). Pet. App. 99a. In Kraft's view, Section 608c(18) did not permit the Secretary to change the location adjustments because he had not found such changes necessary to ensure an adequate supply of fluid milk. *Ibid.* The Secretary rejected that argument, explaining that Section 608c(18) does not apply when he prescribes or changes the terms providing for location adjustments. Pet. App. 99a-100a. Rather, the Secretary stated that Section 608c(18) applies only when he prescribes or changes the terms in a milk marketing order that fix minimum prices. *Ibid.*

c. Petitioners sought administrative review by an administrative law judge (ALJ), who concluded that the Secretary's decision was contrary to law. Pet. App. 208a-265a. The ALJ held, *inter alia*, that the Secretary's view that he was not required to comply with Section 608c(18) when he prescribes or amends location adjustments was a "change of policy." *Id.* at 252a. The ALJ based that determination primarily upon the Secretary's decision in *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1402 (1987). See Pet. App. 243a, 256a-257a.

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peninsula into three zones, with location adjustments of 0 cents, -5 cents, and -7 cents (based on the distance of the zone from the same three-city market). In addition, for plants outside of the lower peninsula, location adjustments are determined by applying a mileage rate to the distance between the plant and a plant inside the peninsula specified by the Secretary. The amendments at issue here increased the mileage rate from 1 cent to 2.25 cents per hundredweight per 10 miles. See Pet. App. 9a-10a.

d. The Judicial Officer of the Department of Agriculture reversed the ALJ's decision. Pet. App. 61a-207a. He explained that "location adjustments are not the 'minimum prices to be paid to producers,' referred to in § [608c](18), but, rather, are *adjustments* (under § [608c](5)) to such minimum prices." *Id.* at 181a. He also stated that the Secretary had interpreted Section 608c(18) not to apply to the issuance or amendment of location adjustments "[f]or over 50 years." *Id.* at 180a. He rejected the ALJ's view that the Secretary had applied a different interpretation in *Borden*. *Id.* at 186a. The Judicial Officer's decision constituted the final decision of the Secretary. See 7 C.F.R. 2.35(a).

2. The present action consolidates judicial challenges to the Secretary's final decision by milk producers and milk handlers, the latter being petitioners in this Court. See Pet. App. 10a-12a, 43a-44a. On cross-motions for summary judgment, the district court set aside the Secretary's decision. *Id.* at 41a-60a.

The district court held that the Secretary is required to conduct the economic analysis prescribed in Section 608c(18) before issuing or amending location adjustments. Pet. App. 50a-58a. The court believed that that holding followed from the meaning of the term "minimum price" in Sections 608c(5) and 608c(18). See *id.* at 52a-54a. The court regarded that term as "not ambiguous." *Id.* at 53a. In its view, "the term minimum price encompasses both the original uniform price and the adjusted price." *Id.* at 54a. Based on that view, it reasoned that, "[s]ince the term minimum price includes adjusted prices, any regulation changing the adjustments in price must necessarily affect the minimum price." *Ibid.*

Because the district court concluded that the Secretary's interpretation conflicts with unambiguous statutory language, it did not decide whether the Secretary's interpretation had changed. The court stated, however, that "[a]t times, the Secretary seem[ed] to have adopted" a different interpretation. Pet. App. 55a. The court based that statement on a Department of Agriculture pamphlet and the Secretary's decision in *Borden*. *Id.* at 55a-56a.

3. The court of appeals reversed, Pet. App. 1a-40a, upholding the Secretary's interpretation of the Act under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Applying the first step of the *Chevron* analysis, the court identified "the precise issue" of statutory interpretation at issue here as "whether the Secretary is required to undertake a § 608c(18) economic analysis when exercising his [608c(5)] authority to make location adjustments to the minimum price of milk." Pet. App. 21a. The court determined that Congress had not "directly spoken" to that issue in the text of the Act, *id.* at 22a-23a, and that the legislative history of the Act "d[id] not make Congress' intent * * * any clearer," *id.* at 27a. Then, under the second step of the *Chevron* analysis, the court concluded that the Secretary's interpretation of the Act is reasonable and consistent with congressional intent, and therefore entitled to *Chevron* deference. *Id.* at 32a.

The court found evidence that the Secretary had previously considered some of the factors specified in Section 608c(18) when making location adjustments under Section 608c(5). Pet. App. 30a. The court concluded, however, that any inconsistency in the Secretary's interpretation "does not allow [the] [c]ourt simply to discount his current position." *Ibid.*

Instead, the court held that the Secretary's position is still entitled to some deference. *Id.* at 30a-31a.[7]

## ARGUMENT

The court of appeals correctly sustained the Secretary of Agriculture's interpretation of the Agricultural Marketing Agreement Act of 1937. The court's decision does not conflict with any decision of this Court or another court of appeals. Indeed, as the court of appeals observed, the question of statutory interpretation involved here is one of first impression. Pet. App. 15a. Further review is therefore not warranted.

1. Petitioners first contend (Pet. 10-14) that the Secretary's interpretation of the Act is not entitled to *Chevron* deference because it reflects a change in interpretation that the Secretary failed to acknowledge and explain. That contention is incorrect. First, the Secretary has not changed his interpretation of the Act. Second, even if he had, his current interpretation is entitled to *Chevron* deference.

a. The Secretary has consistently interpreted the Act not to require him to undertake the economic analysis prescribed in Section 608c(18) for the fixing of minimum prices when he formulates location adjustments under Section 608c(5). In *In re Borden*, 46 Agric. Dec. 1315 (1987), for example, the Secretary

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[7] The court of appeals also rejected petitioners' arguments that the changes in location adjustments were invalid because they were not based on substantial record evidence; they were not based on an "economic service of benefit" to handlers; and they were based on the "prohibited factor" of the handlers' use of the milk. Pet. App. 32a-33a; see also *id.* at 34a-40a. Petitioners do not renew those arguments in this Court. See Pet. 14 n.12.

repeatedly emphasized that his authority to make location adjustments derives exclusively from Section 608c(5).[8]

Although the district court expressed doubt about the consistency of the Secretary's interpretation, it did not squarely hold that his interpretation had changed. The district court merely stated that, "[a]t times, the Secretary *seems* to have adopted" an interpretation that differed from the one he applied in the present case. Pet. App. 55a (emphasis added). The court of appeals found "evidence * * * indicating that the Secretary has given at least lip service to § 608c(18) when making § 608c(5) location adjustments in the past." *Id.* at 30a. Ultimately, however, the court of appeals held that the interpretation was entitled to *Chevron* deference even if it had changed. *Id.* at 31a-32a.

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[8] See, *e.g.*, *Borden*, 46 Agric. Dec. at 1395 ("Since the location adjustment at issue here * * * is expressly authorized by the location adjustment provisions of the Act, * * * there is, of course, no need to find any *other* statutory authorization. * * * [I]t is not necessary to find that the location adjustment satisfies any of the *other* broad objectives of the Act, such as the objective of establishing orderly marketing conditions, or ensuring an adequate supply of milk. It is enough to show that the location adjustment accomplishes the broad congressional objective of pricing milk according to its location value."); *id.* at 1457 ("[U]nless the Secretary has express statutory authority in § 8c(5) of the Act to increase the location adjustment at issue here, he does not acquire that authority under the statement of policy in § 2(4) of the Act. Conversely, if the Secretary has statutory authority to increase the location adjustment under the adjustment provisions of 7 U.S.C. § 608c(5)(A) * * *, that authority would not be decreased in any manner if inequities among producers and handlers did not constitute disorderly marketing conditions").

Moreover, petitioners failed to show that the Secretary's interpretation had changed. Petitioners cited a statement in a Department of Agriculture pamphlet entitled *Questions and Answers on Federal Milk Marketing Orders* defining "minimum price" as "the least amount that proprietary handlers can pay producers for milk." Pet. App. 28a, 55a (quoting pamphlet). Petitioners argued, and the courts below agreed, that "[t]his definition necessarily assumes that location adjustments are part of the minimum price." *Ibid.* That argument, however, assigns to the statement significance that it will not bear. The pamphlet was intended merely to provide a general description of milk marketing regulation to the lay public. It was not meant as a definitive explication of subtle issues of statutory interpretation such as the one involved in this case.

Nor does the Secretary's prior decision in *Borden* evidence a change in his interpretation. Petitioners cited statements in *Borden* indicating that, in prescribing location adjustments under Section 608c(5), the Secretary may consider the adequacy of the milk supply in a marketing area, which is one of the economic factors that the Secretary is required to consider in Section 608c(18). See Pet. App. 28a. Even the court of appeals believed that those statements did no more than "*impl*[*y*] that the Secretary's location adjustments must comply with the requirements of § 608c(18)." *Id.* at 29a (emphasis added). Moreover, as the Secretary explained in his decision in this case, *id.* at 186a-187a, any such implication is dispelled when *Borden* is read in its entirety. The Secretary made clear in *Borden* that, while he believes that he has the discretion to consider the adequacy of the milk supply in prescribing location adjustments, he

does not believe that he is required to consider that factor.[9] He also took the position that he has discretion to consider other economic factors that might well be encompassed in Section 608c(18), to the extent that those factors bear upon location adjustments.[10] The Secretary took precisely the same position in the present case:

> Depending on the facts relevant to a particular location adjustment, some of the same factors that are required to be considered in Class price changes under § [608c](18) may be considered in a location adjustment change under § [608c](5), but there is no statutory requirement that a location

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[9] See *Borden*, 46 Agric. Dec. at 1395 ("it is not necessary to find that the location adjustment * * * ensur[es] an adequate supply of milk"); *id.* at 1420 (Secretary's consideration of adequacy of milk supply and other factors, such as disorderly marketing conditions, "are merely different aspects of the single common theme * * * that the producers providing the economic service of transporting milk to [a particular location] should be compensated for providing that economic service of benefit to the handlers [in that location]").

[10] See note 9, *supra*; see also *Borden*, 46 Agric. Dec. at 1428 (Secretary's consideration of inequity among producers in making location adjustments does not have to be authorized by statutory provision requiring uniformity; instead, review is to determine "whether the Secretary acted in an arbitrary and capricious manner when he looked at producer inequities in deciding whether to exercise his express statutory authority to adjust the uniform Class I prices of milk paid by handlers based on 'the locations at which delivery of such milk * * * is made to such handlers'," quoting 7 U.S.C. 608c(5)(A)); *id.* at 1451 ("we are only reviewing the Secretary's findings as to equity among handlers to determine whether the Secretary used his express location-adjustment authority in an arbitrary and capricious manner").

> adjustment change under § [608c](5) be supported by a § [608c](18) analysis.

Pet. App. 185a-186a. Thus, the Secretary's interpretation of the Act has not changed.

b. In any event, assuming arguendo that the Secretary's interpretation of the Act has changed, the court of appeals properly deferred to his interpretation under *Chevron*.

i. Petitioners contend (Pet. 12-13) that, when an agency changes its interpretation of a statute, its new interpretation is not entitled to *Chevron* deference unless the agency acknowledges and explains the reason for the change. That contention fails to distinguish between two distinct principles of administrative law.[11]

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[11] Although petitioners devote their submission in this Court to the Secretary's failure to explain an asserted change in his interpretation of Section 608c(18), that was only one of the many issues that were fully aired and that the Secretary addressed in the agency proceeding. The Secretary (through the AMS) conducted a formal, on-the-record rulemaking proceeding, the adequacy of which petitioners do not challenge. See Pet. App. 10a. He explained the basis for his action in a proposed decision to which petitioners were entitled to file exceptions. See *id.* at 99a. The final decision was subject to a producer referendum, followed by administrative review by an ALJ and the Judicial Officer. At each stage, the decisionmaker issued a lengthy opinion specifically addressing, among other things, the contention that the Secretary was required to conduct the analysis prescribed in Section 608c(18) and had done so in prior proceedings involving location adjustments. See *id.* at 99a-100a (AMS's decision); *id.* at 180a-181a (Judicial Officer's decision); *id.* at 252a (ALJ's decision). The elaborate nature of the agency proceeding and the specific attention to the issue that petitioners raise in this Court belie

The *Chevron* principle requires courts to defer to an agency's reasonable interpretation of an ambiguous provision in a statute that it is charged with administering. See 467 U.S. at 843; accord, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993). This Court has never held that *Chevron* deference is unwarranted when an agency's interpretation, though reasonable, reflects a change that the agency has failed to acknowledge and explain. On the contrary, in *Chevron* as well as other cases, the Court has deferred to agency interpretations that had changed without imposing a requirement that the agency acknowledge or explain the change. See *Chevron*, 467 U.S. at 863 (upholding agency interpretation despite "[t]he fact that the agency ha[d] from time to time changed its interpretation"); see also *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995); *Good Samaritan*, 113 S. Ct. at 2160-2162; *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 780-781, 787 (1990); *id.* at 799 (Blackmun, J., dissenting); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350-351 (1978). As the Court in *Chevron* explained, 467 U.S. at 863-864:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Thus, the fact that an agency has changed its interpretation of a statute "might reduce, but [does]

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petitioners' suggestion (Pet. 10-13 & n.11) that the Secretary failed to exercise his discretion in a considered manner.

not eliminate, the deference [a court] owe[s] [to the agency's] reasoned determination." *NationsBank*, 115 S. Ct. at 817.[12]

Another principle of administrative law requires an agency to explain its action on matters of policy sufficiently to permit judicial review of that action under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). See, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983); *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974); see also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). The nature of the required explanation varies from case to case, depending on the nature and background of the agency action before the court. In *Motor Vehicle*, for example, the Court held that the Secretary of Transportation did not adequately explain his rescission of a safety standard that had required motor vehicles to have either airbags or passive seat belts. See 463 U.S. at 34-38. The Court determined that the Secretary was required to explain why he did not

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[12] Of course, if an agency has changed its interpretation of an ambiguous statutory provision, its explanation for the change may well assist the court in assessing the reasonableness of the new interpretation under step two of the *Chevron* analysis. Thus, in according *Chevron* deference to an agency statutory interpretation that had changed, the Court in *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991), noted that the agency had provided an explanation for the change. As petitioners appear to acknowledge (Pet. 12), however, *Rust* does not stand for the broad proposition that an agency's reasonable interpretation of an ambiguous statutory provision is never entitled to *Chevron* deference unless the agency acknowledges and explains any change in its interpretation.

modify the standard to require either airbags alone or airbags and continuous ("spooling") passive seat belts, because, in the Court's view, those were obvious alternatives to rescission in light of prior statements by the Secretary. See *id.* at 46-57; see also *id.* at 51 ("given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement"), 56 (in light of prior statement that continuous passive seat belts were safe, agency was required to explain why they were not acceptable on safety grounds).

Petitioners contend (Pet. 12) that the principle enunciated in *Motor Vehicle* "should be held to apply in the *Chevron* setting." This case, however, differs sharply from *Motor Vehicle*. Petitioners have shown, at most, only that the Secretary previously interpreted the Act in a different manner. Petitioners have pointed to no statement of the Secretary's rationales for the interpretation that, they assert, he previously adopted. Accordingly, unlike the agency in *Motor Vehicle*, the Secretary cannot be expected to explain why he no longer subscribes to rationales to which he never subscribed in the first place. Instead, assuming arguendo that the *Motor Vehicle* principle applies in determining whether the Secretary's interpretation is entitled to *Chevron* deference, the principle was satisfied by the Secretary's reasonable explanation for his current interpretation. In any event, petitioners' premise that the Secretary has changed his legal interpretation rests primarily on the prior decision in *Borden*; yet the Secretary's final decision in this case extensively discusses *Borden* and rejects the proposition that his decision here

departs from *Borden*. Pet. App. 186a-191a. Petitioners' contention that the Secretary ignored prior agency pronouncements in the area therefore is without merit.

The court of appeals' decision sustaining the Secretary's interpretation in these circumstances does not conflict with the lower court decisions cited by petitioners (see Pet. 10-11). Petitioners cite no decision in which a court has set aside an agency interpretation that the court considered reasonable on the ground that the agency refused to acknowledge and explain a prior, conflicting interpretation.[13] The only decision cited by petitioners reversing an agency's interpretation held that the agency's interpretation was substantively irrational. *Mazza* v. *Secretary of HHS*, 903 F.2d 953, 960 (3d Cir. 1990).[14] In several other decisions cited by petitioners agency interpretations that had changed were upheld because the agency provided a reasonable explanation for its *current* interpretation. In *Sacred Heart Medical*

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[13] Petitioners acknowledge (Pet. 11 n.9) that the decision below is consistent with *De Osorio* v. *INS*, 10 F.3d 1034 (1993), in which the Fourth Circuit held that, because the agency interpretation before the court was reasonable, it was "immaterial" whether the agency had previously subscribed to a different interpretation. *Id.* at 1042.

[14] Respondents Farmers Union Milk Marketing Cooperative, *et al.*, err in arguing (Resp. Br. in Support of Pet. 14) that the decision below conflicts with *Lehigh Valley Farmers* v. *Block*, 829 F.2d 409 (3d Cir. 1987). *Lehigh Valley* held that the Secretary's decision to expand the geographic area covered by two milk marketing orders was not supported by substantial record evidence. *Id.* at 412-416. That holding is inapposite here.

*Ctr.* v. *Sullivan*, 958 F.2d 537, 545 (3d Cir. 1992), for example, the court stated:

> Here, the Secretary contends that, although the HCFA may have previously interpreted the statute improperly, its current construction is in full accord with the language of the [statute] and the legislative intent that motivated its enactment. This surely constitutes a "reasoned justification" for the Secretary's departure from its prior interpretation. Accordingly, the Secretary's interpretation of the statute must be upheld if this Court determines that it is reasonable.

See *id.* at 550 ("although the [agency] espoused a different interpretation * * * previously, it has offered a reasonable justification for its new position").[15]

ii. Under the case law cited by petitioners, the Secretary provided a "reasoned justification" for his interpretation by showing that it "is in full accord with the language of the [statute] and the legislative intent that motivated its enactment." *Sacred Heart*, 958 F.2d at 545. The AMS's and the Judicial Officer's

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[15] See also *Mobil Oil Corp.* v. *EPA*, 871 F.2d 149, 151-154 (D.C. Cir. 1989) (framing issue as whether agency had "arrived at" a reasonable interpretation, and upholding "new" interpretation based on its reasonableness); *Seldovia Native Ass'n* v. *Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990) (Secretary adequately explained change in interpretation by showing that new interpretation was consistent with regulations and administrative practice under comparable statute, and facilitated administrative determinations required of State); *Exxon Corp.* v. *Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992) (agency adequately explained asserted change in interpretation by showing that current interpretation was consistent with legislative history).

decisions make clear that the Secretary believes that the Act cannot properly be read to require him to undertake an analysis under Section 608c(18) when he issues or amends location adjustments under Section 608c(5). See Pet. App. 99a-100a, 180a-181a.[16]

The statutory text supports the Secretary's view. Section 608c(5) authorizes the Secretary to include in milk marketing orders terms that: (1) "[c]lassify[] milk" according to its end use; (2) "fix[], or provid[e] a method for fixing, minimum prices for each such use classification"; and (3) provide for "adjustments" to "[s]uch prices," based on 'the locations at which delivery of such milk * * * is made to such handlers." Section 608c(18), in turn, applies only to terms that "fix minimum prices." Section 608c(18) thus does not apply when the Secretary prescribes or amends terms classifying milk according to its use or providing for location adjustments.

That conclusion is reinforced by the different nature of minimum prices and location adjustments. Section 608c(18) requires the Secretary, in fixing minimum prices, to consider "the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area." 7 U.S.C. 608c(18). The relevance of those factors to the price of milk is obvious. Those factors are not,

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[16] Thus, the Secretary, unlike the court of appeals (Pet. App. 22a), does not believe that petitioners' interpretation of the Act is reasonable. See Pet. App. 22a. For the reasons discussed in the prior section, however, the court's disagreement with the Secretary regarding the reasonableness of *petitioners'* interpretation provided no basis for striking down the *Secretary's* interpretation.

however, invariably relevant to determining how the price of milk should be adjusted to reflect "the locations at which delivery of * * * milk * * * is made." 7 U.S.C. 608c(5)(A)(3). Thus, Congress intended to allow the Secretary to conduct a more focused inquiry when formulating location adjustments under Section 608c(5) than he is required to undertake when fixing minimum prices under Section 608c(18).

Unlike the Secretary's interpretation, petitioners' interpretation ignores critical statutory language. Petitioners have argued that Section 608c(18) applies to location adjustments because those adjustments affect the price of milk. See Pet. App. 18a, 52a. The district court agreed, reasoning that "any regulation changing the adjustments in price must necessarily affect the minimum price." *Id.* at 54a. That reasoning ignores that Section 608c(18) does not apply to every term in a marketing order that *affects* the minimum price; instead, it applies only to terms that "*fix* the minimum price." 7 U.S.C. 608c(18) (emphasis added). A term can be said to "fix" the minimum price only if it specifies a minimum price or prescribes a method for calculating minimum prices. See 7 U.S.C. 608c(5)(A) (1988 & Supp. V 1993) (Secretary shall prescribe terms "fixing, or providing a method for fixing, minimum prices"). Because the terms providing for location adjustments do neither, they are not covered by Section 608c(18). Compare 7 C.F.R. 1040.50-1040.51a (price terms) with 7 C.F.R. 1040.52 (terms providing for location adjustments).

In accepting petitioners' contrary interpretation, the district court attached significance to legislative history indicating that Section 608c(18) was enacted "for the guidance of the Secretary in fixing milk

prices." Pet. App. 57a (quoting S. Rep. No. 565, 75th Cong., 1st Sess. 3 (1937)). The court reasoned that "[i]t would be illogical for Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever." *Id.* at 57a-58a. The Secretary is not without guidance, however; he must base the adjustments on "the locations at which delivery of such milk * * * is made to [milk] handlers." 7 U.S.C. 608c(5)(A)(3). Thus, he cannot use location adjustments as a way of circumventing the price-fixing analysis of Section 608c(18). As the court of appeals correctly determined (Pet. App. 23a-24a), the district court misread the legislative history.

2. Petitioners also contend (Pet. 15-18) that, in determining whether Congress has "directly spoken to the precise question at issue," as required under the first step of the *Chevron* analysis, 467 U.S. at 842, the court of appeals failed to draw reasonable inferences from the statutory text that, petitioners claim, support their interpretation. Pet. 15. As discussed above, however, the text of the Act supports the Secretary's, not petitioners', interpretation. In any event, the question whether the court of appeals articulated its analysis of the Act in sufficient detail in this particular case does not warrant review by the Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1995